

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-1353

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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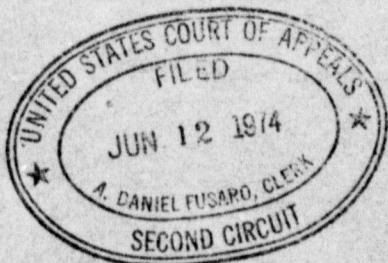
UNITED STATES OF AMERICA,
Appellee

v.

FRANK J. MCKIBBIN and ROBERT L. DiGREGORIO,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES



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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES

ISSUES PRESENTED

- 1) Whether the trial court properly denied appellants' motion for a new trial based on newly discovered evidence.
- 2) Whether the extortion victim's testimony concerning a beating which he saw appellant McKibbin give a co-worker was properly received into evidence.
- 3) Whether the trial court abused its discretion in not ordering the victim to submit to a psychiatric examination.

STATEMENT

A grand jury in the Eastern District of New York returned an indictment which alleged that appellants McKibbin and DiGregorio used extortive means to collect and to attempt to collect extensions of credit from one Aram Carapetyan, in violation of 18 U.S.C. 894 and 18 U.S.C. 2 (count one)

and that appellant McKibbin used extortionate means to collect and to attempt to collect extensions of credit from one Carl Gross, in violation of 18 U.S.C. 894 (count two). After a jury trial, both appellants were convicted on count one and appellant McKibbin was acquitted on count two. McKibbin was sentenced to imprisonment for one month to be followed by twenty-three months' probation. DiGregorio was placed on probation for one year.

Aram Carapetyan, the government's principal witness at trial, was a driver for the Kings Bay Car Service in Brooklyn (Tr. 77). In July 1971, Carapetyan needed money to pay his rent. After several fellow drivers suggested that appellant McKibbin, a former driver who frequented the car service, would lend him money, Carapetyan asked McKibbin for a loan (Tr. 79, 533). McKibbin wrote down Carapetyan's name, address, telephone number, and license plate number and gave him \$100. Carapetyan understood McKibbin to say that he should repay the loan by giving him \$5 a week (Tr. 80-81).

After making twenty \$5 payments to McKibbin, Carapetyan stopped paying in late November 1971 (Tr. 80). Several weeks later McKibbin told Carapetyan that because he had fallen behind in his payments the debt had increased to \$150 and the weekly payments would now be \$10 (Tr. 80-81).

Carapetyan paid McKibbin \$10 a week until March 1972. In March, after Carapetyan stopped making payments, McKibbin approached him at the car service and said that he wished to speak with him in private. According to Carapetyan, they went into a nearby locksmith's shop that was owned by an acquaintance of Carapetyan's named Jack. There McKibbin told Carapetyan that because he had missed payments the debt had increased to \$450 and the weekly payments would be \$20. Carapetyan told McKibbin that he had "had it" and would pay no more. Without a word, McKibbin punched Carapetyan in the stomach and face, giving him a bloody nose. After hitting Carapetyan, McKibbin told

him, "You are very fortunate I hit you this time. Next time, somebody else will and you will never be able to walk." McKibbin continued, "I can't take you to the court but next time somebody else is going to come and take care of you . . . I will break your arms and legs" (Tr. 82-84, 132).

After the beating, Carapetyan paid \$20 weekly to McKibbin until July 1972, when he again ceased making payments. About two weeks after Carapetyan stopped paying, McKibbin informed him that because he was not making payments, the debt had increased. McKibbin told Carapetyan "your account is out of my hands" and said that he would have to consult with his boss to determine the new amount of the debt. A short time later, McKibbin told Carapetyan that the debt had risen to \$800 and that the weekly payments were to be \$25. He said that Carapetyan would be hurt if he failed to pay (Tr. 85-86). Soon thereafter, on July 19, 1972, petitioner contacted the F.B.I. (Tr. 315).

On the evening of July 25, 1972, McKibbin telephoned Carapetyan at home and told him, "Aram, you better come down here and pay your \$25 payment, or I am going to come over to your house and break your arms and legs" (Tr. 87). The next day, July 26, 1972, Carapetyan again consulted with the F.B.I. (Tr. 315).

On August 3, 1972, Carapetyan was walking along a Brooklyn street when McKibbin drove up in his car. Appellant DiGregorio, who was riding in the passenger seat, got out of the car and asked Carapetyan to enter. Carapetyan refused. McKibbin and DiGregorio asked Carapetyan whether he had the money with him. Carapetyan told them that he had a \$400 check that had not yet cleared. He arranged to meet with McKibbin the next day (Tr. 87-88).

The following day, August 4, 1972, F.B.I. agents fitted Carapetyan with a concealed radio transmitter and drove him to a location in Brooklyn where he had arranged to meet McKibbin. The agents parked a short distance

away, from where they could observe the site of the scheduled meeting. After about twenty minutes McKibbin arrived and began speaking with Carapetyan. The ensuing conversation was monitored and tape-recorded by the agents (Tr. 337 1/
340).

Carapetyan told McKibbin that he was still waiting for a \$400 out-of-town check to clear and that he expected to be able to pay McKibbin by the following Tuesday, August 8, 1972, at the latest (Tr. 363-367).

Appellant DiGregorio arrived during the conversation and the following exchange occurred (Tr. 367-370):

C By Tuesday if I can't.

D I really think you should * * *

M Tuesday, it's as simple as that.

D I should hope so * * *

M Aram . . . if you go past Wednesday, run away. That's all I can tell you. Run away.

C Take off . . . go . . .

M Right.

C . . . don't come back . . . huh . . . is that what you say, Bob?

D I would suggest it, yes.

C You suggest it . . .

M I would suggest it, really. If you don't come Wednesday . . .

C . . . by Wednesday

M . . . I might do something . . . * * *

M If there wasn't somebody I hate more than you right now . . .

C Uh-uh . . .

1/ A tape-recording of the conversation was played at trial (Tr. 363-370).

M I'd fucking kill you. All right (inaudible). Somebody else
I want to save all my fucking frustrations for him . . .

On August 8, 1972, F.B.I. agents again fitted Carapetyan with a transmitter and drove him to a location where McKibbin had arranged to meet him at 3 p.m. The agents parked a block away, from where they could observe developments and monitor the transmitter (Tr. 93, 315-317).

About 2:30 p.m. appellant DiGregorio drove up and began a conversation with Carapetyan (Tr. 319)^{2/}. He told Carapetyan that McKibbin would be there at 3 p.m. Carapetyan informed DiGregorio that the check he was waiting for had bounced. He then mentioned to DiGregorio that he had a life insurance policy with a \$1,000 cash value. DiGregorio asked how long it would take to get the money from the policy. Carapetyan indicated that it would take a week or two. DiGregorio said that he did not know whether McKibbin could wait that long. DiGregorio left after reminding Carapetyan that McKibbin would be there later and telling him "don't go anywhere" (Tr. 381-384).

McKibbin arrived and asked Carapetyan for the money. He told Carapetyan that although he had initially owed \$100, the debt had risen to \$450 and now \$900. Carapetyan told McKibbin about the bounced check and the insurance policy (Tr. 385-389). While they were talking, McKibbin noticed a wire on Carapetyan and grew suspicious that he might be wearing a tape recorder. He ordered Carapetyan to get into his car and submit to a search. Carapetyan refused (Tr. 385-396, 555).

At this point one of the agents who had been monitoring the transmitter walked up and joined the conversation. Posing as a friend of

^{2/} A tape-recording of segments of Carapetyan's August 8, 1972 conversation with DiGregorio and McKibbin was played at trial (Tr. 381-396).

Carapetyan's, the agent took him by the arm and led him away from McKibbin on the pretext of buying him a drink (Tr. 299-300).

DiGregorio was questioned by F.B.I. agents on August 9, 1972. After being advised of his rights, he told the agents that he had been friendly with McKibbin for several years but knew nothing about any loan which McKibbin had made to Carapetyan. He denied having taken part in any conversations with McKibbin and Carapetyan regarding a loan (Tr. 308-309).

Federal agents interviewed McKibbin on May 29, 1973. After the agents advised McKibbin of his rights, he told them that he had given Carapetyan a \$900 interest-free loan and that when Carapetyan had failed to repay it, he had on two occasions threatened to beat him. McKibbin stated to the agents that except for the loan to Carapetyan, the only loans he ever made were small "friendly" loans of \$5 or \$10 to his acquaintances (Tr. 344-348).

At trial two government witnesses testified that they had borrowed money from McKibbin at usurious rates of interest. Carl Gross, a former driver at the car service, testified that in March and April 1972 he borrowed \$700 from McKibbin at 5% weekly interest (Tr. 439-442). One Harold Koenig, another former driver, testified that he borrowed \$200 from McKibbin at 5% weekly interest in the summer of 1972 (Tr. 398-400).

Appellant McKibbin testified in his own behalf at trial that in August 1972, although he was then unemployed, he had given out \$1,800 in interest-free loans: \$900 to Carapetyan, \$700 to Gross, and \$200 to Koenig (Tr. 563-564, 567). McKibbin denied ever having struck Carapetyan (Tr. 543). He admitted having told Carapetyan that he was "going to punch the shit out of him" if he did not pay, but said that he had not intended the remark as a threat (Tr. 553-554). McKibbin explained that he had not told the F.B.I. about the loans to Gross and Koenig because he was afraid (Tr. 560). He further

stated that appellant DiGregorio was in no way involved in the collection of the debt from Carapetyan (Tr. 557).

Appellant DiGregorio testified in his own behalf that he had known appellant McKibbin for about three years in August 1972, but was unaware that he had loaned significant amounts of money, except to Carapetyan (Tr. 490-491). DiGregorio stated that at McKibbin's request he had asked Carapetyan to wait on August 8, 1972 so that McKibbin could speak to him about the debt (Tr. 503, 507, 517). However, he testified that his remark, "I would suggest it"--made to Carapetyan on August 4, 1972 after McKibbin had told Carapetyan to run away if he did not pay by Wednesday--had no purpose (Tr. 526-527).

ARGUMENT

I

**THE TRIAL COURT PROPERLY DENIED APPELLANTS'
MOTION FOR A NEW TRIAL ON THE GROUND OF NEWLY
DISCOVERED EVIDENCE**

The government first learned of McKibbin's assault upon Carapetyan in the locksmith shop when Carapetyan told Department of Justice Special Attorney David Ritchie about the incident during an interview about one week before trial. Carapetyan mentioned the beating after Ritchie had told him that he would have to tell the whole truth when he testified (Tr. 167-169). Carapetyan explained to Ritchie that he had not disclosed the incident earlier to avoid involving his friend Jack, the locksmith, who had asked him to say nothing because he did not wish to testify (Tr. 167-169, affidavit of ^{3/} David Ritchie at 2-3).

In his opening statement at trial the prosecutor said that Carapetyan would testify for the government that when he stopped making loan payments McKibbin beat him up in a nearby key shop (Tr. 62-63). Subsequently, Carapetyan, in his direct testimony, described how McKibbin had assaulted him in his friend Jack's locksmith shop, which he indicated was located next to the car service (Tr. 82-84).

On cross-examination Carapetyan testified that Jack was present when the beating occurred (Tr. 132-134). He also explained how his desire to honor his friend Jack's request and not involve him had caused him to remain silent about the incident (Tr. 167-169).

^{3/} The district court, in ruling on appellants' motion for a new trial, considered affidavits sworn by prosecutor Ritchie, appellant McKibbin's counsel, Leon Port, and locksmith Jack Levine.

The jury returned its verdict on November 15, 1973. On December 12, 1973, appellants moved for a new trial under F.R.Crim.P. 33 on the ground of newly discovered evidence. The proffered evidence was an affidavit sworn by one Jack Levine, the former owner of a locksmith shop near the Kings Bay Car Service, in which Levine stated that he had never seen McKibbin strike Carapetyan. In support of the motion appellant McKibbin's attorney, Leon Port, submitted an affidavit in which he recited (affidavit of Leon Port at 6-7):

There was no way during the trial that Jack Levine could be located, althoutht [sic] attempts were made to do so, since the store which he had formerly operated was closed for approximately one year. Mr. McKibbin, unlike Mr. Carapetyan, did not have Jack's last name or address or phone number; only by circulating among all the car services did he finally find a mutual friend, a Mr. Gross, somewhere on Avenue U in Brooklyn, who was found only after a store by store search, pursuant to my request, which search could not properly be completed until after the trial was over.

At a hearing on the motion on January 18, 1974, Jack Levine testified that he had owned and operated a locksmith shop next to the car service (H. Tr. 19). Levine stated that he had never seen McKibbin strike or threaten Carapetyan and had never asked Carapetyan to conceal his presence at any assault (H. Tr. 24-25).

Appellant McKibbin testified at the hearing that he had known for three or four years that Jack's last name was Levine and that he did not recall his attorney's having asked him what Jack's last name was after Carapetyan testified at trial concerning Jack's presence during the assault (H. Tr. 5, 11). He further testified that he began to search for Levine "a couple of days" after the jury's verdict (H. Tr. 10).

On February 6, 1974 the district court denied appellants' motion for a new trial in a twelve-page written order (App. D).

Appellants urge this Court to reverse that ruling and order a new trial. However, there is no reason to overturn the ruling below.

1. In United States v. Kahn, 472 F. 2d 272 (2nd Cir., 1973), this Court enumerated the criteria which must be satisfied before a trial court may grant a motion for a new trial based on newly discovered evidence: (1) the evidence "must be material to the factual issues at trial and not merely cumulative and impeaching;" (2) it "must have been discovered after trial;" and (3) it "must be of such a character that it would probably produce a different verdict in the event of a retrial." 472 F. 2d at 287. See also United States v. DeSapio, 456 F. 2d 644, 647 (2nd Cir., 1972); United States v. Polisi, 416 F. 2d 573, 576-577 (2nd Cir., 1969).

The district court's denial of appellants' motion was grounded on its factual determination that criteria (2) and (3) above had not been met (App. D. at 12).

Evidence cannot be considered newly discovered which the defense, using due diligence, could have discovered and presented at trial. See United States v. Costello, 255 F. 2d 876, 879 (2nd Cir., 1958), certiorari denied, 357 U.S. 937 (1958). See also United States v. Jacobs, 431 F. 2d 754, 763 (2nd Cir., 1970), certiorari denied, 402 U.S. 950 (1971); United States v. Edwards, 366 F. 2d 853, 873 (2nd Cir., 1966), certiorari denied, 386 U.S. 908 (1967). The district court properly found that the defense, using reasonable diligence, could have discovered and presented Levine's testimony at trial. As the district court points out in its order (App. D. at 6-7), the government's opening statement gave appellants notice that Carapetyan would testify concerning the beating which McKibbin gave him in the locksmith shop. Carapetyan's direct testimony established that the locksmith shop where the beating occurred was located near the car service and owned by a friend of Carapetyan's named Jack. On cross-examination, Carapetyan testified that

Jack was present when the beating occurred. Despite these factors, appellants made no demand on the government for identification or production of the witness.^{4/} Furthermore, as the district court found (App. D at 8), appellants, in cross-examining Carapetyan, "avoided asking the obvious questions that would have identified Jack Levine." Moreover, although the court told McKibbin's counsel that it would grant a continuance for the purpose of producing witnesses (Tr. 611-613), no request for a continuance was made. In these circumstances, the exercise of reasonable diligence would have enabled appellants to locate Levine and call him as a witness at trial, had they so desired.

2. Similarly, the district court's finding that Levine's testimony was not of sufficient weight to produce a different result at a retrial has a substantial basis in the record. The government's case against appellants was essentially grounded in Carapetyan's tape-recorded conversations with appellants on August 4 and 8, 1972 which, as the district court found (App. D at 10), corroborated Carapetyan's testimony that appellants made clear to him that failure to pay the debt would entail dire consequences for him. In addition, as the district court noted (App. D at 12), appellants' inculpatory and exculpatory statements made to federal agents were inconsistent with their testimony at trial and supported the verdict.

Proving the March 1972 beating of Carapetyan by McKibbin in Levine's shop was not essential to the government's case. The incident did not occur within the period covered by the indictment (May 1 - August 9, 1972) and was

^{4/} By contrast, as the district court noted in its order (App. D at 7, n.7), when Carapetyan testified that he saw McKibbin beat up a fellow driver named "Marty" (see point II, infra), counsel for appellant McKibbin stated that he had no way of locating the witness, and government, at the court's direction, advised counsel of the witness' name, address and telephone number (Tr. 103-105).

relevant only as it bore on the state of mind of the extortion victim. Although Levine's testimony at a retrial might have diminished Carapetyan's credibility with regard to whether he suffered violence at McKibbin's hands, it could not have affected the probative value of the tape-recorded conversations which occurred during the period of the indictment and constituted the foundation of the government's case.

3. As the district court pointed out (App. D at 6, n.5), if it can be shown that the government deliberately suppressed evidence, a new trial is warranted if the evidence is merely material or favorable to the defense. Kahn, supra, at 287; Giglio v. United States, 405 U.S. 150, 153-154 (1972); Brady v. Maryland, 373 U.S. 83 (1963). Where the suppression is unintentional, a new trial will still be ordered if it appears that the high value of the undisclosed evidence could not have escaped the prosecutor's attention. Kahn, supra, at 287; Polisi, supra, at 577. Those tests are not applicable here, since, as the district court properly found, the government suppressed no evidence, either intentionally or otherwise (App. D at 6, n.5).

As detailed above, the government only learned of McKibbin's assault on Carapetyan one week before trial. By referring in its opening statement to the beating in the locksmith shop, the government alerted the defense to the possibility that the proprietor of that establishment might be of some value as a witness. Although, in view of Carapetyan's report that Levine was loathe to testify and in light of the fact that Carapetyan's story had been corroborated by the tape recordings, the prosecution did not interview the locksmith in the remaining days before the trial, the government in no way suppressed the fact of Levine's existence as a possible witness. To the contrary, in bringing out on the direct examination of Carapetyan that the assault occurred next to the car service in a locksmith shop that was owned by a friend of Carapetyan's named Jack, the prosecution laid out a path to

Levine which the defense could easily have followed had it elected to do so. At no time before or during trial did the government have any reason to believe that Levine's testimony might be favorable to appellants.

Appellant DiGregorio in his brief (D. Br. at 14) refers to a remark made by the prosecutor at a pre-trial hearing on the admissibility of the conversation tape-recorded on August 8, 1972. At that hearing, appellants successfully argued that a final part of the conversation between McKibbin and Carapetyan during which McKibbin tried to search Carapetyan for a tape recorder should be suppressed as unduly prejudicial. Preliminary to suppressing that portion of the tape, the trial court went over a transcript of the recording with counsel to ascertain whether any of the conversation was relevant to the offense charged. In the part of the conversation that was eventually suppressed, one of the speakers had asked, "what happened to Jack?" The court inquired of counsel, "who is this Jack?" In that context, the prosecutor replied: "He is a local store owner, I believe, your honor, that is irrelevant conversation, that is an irrelevant name" (Tr. 26). This statement was simply a candid admission by the government that part of the tape was not important to the prosecution's case. Read in the context of the hearing, the remark cannot fairly be interpreted as a representation by the prosecution that Jack would not figure in the case developed at trial. Indeed, later that same day the government in its opening statement referred to the assault in the locksmith shop.

4. A motion for a new trial is addressed to the sound discretion of the trial judge. Costello, supra at 879; United States v. Johnson, 208 F. 2d 404, 405 (2nd Cir., 1953), certiorari denied, 347 U.S. 928 (1954). In exercising that discretion, the court may use the knowledge acquired in the conduct of the trial. United States v. On Lee, 201 F. 2d 722, 723 (2nd Cir.,

1953), certiorari denied, 345 U.S. 936 (1953). A jury's determination of a defendant's guilt is not to be lightly brushed aside. See United States v. Costello, supra, at 879. The burden is on the defendants to show that the interests of justice require a new trial. United States v. Soblen, 203 F. Supp. 542, 564 (S.D. N.Y., 1961), affirmed, 301 F. 2d 236 (2nd Cir., 1962), certiorari denied, 370 U.S. 944 (1952). Such motions are not favored and should be granted only with great caution. United States v. Lombardozzi, 343 F. 2d 127, 128 (2nd Cir., 1965).

The scope of review by an appellate court in reviewing a ruling on a motion for a new trial based on newly discovered evidence is set forth in United States v. Johnson, 327 U.S. 106, 111-112 (1946). There the Court said that findings of fact of the trial court should not be set aside unless it "clearly appear[s]" that those findings are "not supported by any evidence." See also, Kahn, supra, at 287; United States v. Silverman, 430 F. 2d 106, 119-120 (2nd Cir., 1970), certiorari denied, 402 U.S. 953 (1971); United States v. Curry, 358 F. 2d 904, 918-919, (2nd Cir., 1965). As the Supreme Court said in Johnson (327 U.S. at 112):

He [the trial judge] had conducted the original trial and had watched the case against Johnson and the other respondents unfold from day to day. Consequently, the trial judge was exceptionally qualified to pass on the affidavits. The record of both the original trial and the proceedings on the motions for a new trial shows clearly that the trial judge gave the numerous elements of the controversy careful and honest consideration. We think that even a casual perusal of this record should have revealed to the Circuit Court of Appeals that here nothing more was involved than an effort to upset a trial court's findings of fact.

We submit that in the instant case there is a substantial basis for the district court's findings, which were obviously made after careful consideration, and no occasion for this Court to set them aside.

II

CARAPETYAN'S TESTIMONY CONCERNING A BEATING WHICH
HE SAW APPELLANT MCKIBBIN GIVE ANOTHER CAR SERVICE
DRIVER WAS PROPERLY RECEIVED INTO EVIDENCE

Over defense objection, Carapetyan testified that prior to his conversation with appellants in August 1972 he had seen appellant McKibbin hitting one Meyer Katcher, an elderly man who drove for the car service (Tr. 100, 116-117, 192). This testimony was properly received into evidence.

^{5/} 18 U.S.C. 894(b) and (c) permit the introduction of evidence of a defendant's prior conduct, character, and reputation. United States v. Curcio, 310 F. Supp. 351, 357-358 (D. Conn., 1970). Since there was no evidence that McKibbin beat Katcher in connection with the collection or attempted collection of an extension of credit, section 894(b) has no application. Under section 894(c), the court in its discretion may in certain circumstances permit the introduction of evidence concerning the reputation of the defendant in any community of which the alleged extortion victim was a member for the purpose of showing that the words used as a means of collection carried an express or implicit threat. Carapetyan's testimony concerning McKibbin's assault on his fellow

5/ Section 894(b) provides:

In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

18 U.S.C. 894(c) provides:

In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the (footnote continued)

car service driver was admissible under 894(c) to show appellant was a man of violent reputation whose words to Carapetyan on various occasions carried express and implied threats.

Reputation may be relevant where the offense involves instilling fear in the victim, since it can convey a tacit threat of violence. United States v. Tropiano, 418 F. 2d 1069, 1081 (2nd Cir., 1969). Section 894(c) does not authorize the introduction of a defendant's reputation to show his criminal character and disposition; rather such evidence is admissible to demonstrate the victim's state of mind. Curcio, supra, at 357. It is well-established that in a prosecution for an extortionate crime evidence to show the state of mind of the victim is relevant. See United States v. Frazier, 479 F. 2d 983, 986 (2nd Cir., 1973); United States v. Zito, 467 F. 2d 1401, 1404 (2nd Cir., 1972); Curcio, supra, at 357-358.

Here, the district court properly exercised its discretion under 18 U.S.C. 894(c) in permitting Carapetyan to testify how McKibbin assaulted Katcher. That Carapetyan had seen McKibbin beat a fellow car service driver was highly relevant to Carapetyan's state of mind when he heard McKibbin say, "I will break your arms and legs" or "if you go past Wednesday, run away."

actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ORDER CARAPETYAN TO SUBMIT TO A PSYCHIATRIC EXAMINATION

Appellant McKibbin filed a pre-trial motion requesting the district to order a psychiatric examination of Carapetyan. In support of the motion, appellant submitted affidavits sworn by three car service drivers, which depicted Carapetyan as a quixotic person who was frequently the butt of jokes and the victim of hoaxes devised by his co-workers. In opposing the motion, the government submitted an affidavit sworn by F.B.I. Agent Michael Parks, who recited that he had interviewed Carapetyan many times and had always found him to be "very rational and logical." Additionally, in its response, the government informed the court that Carapetyan's accusations were corroborated by the tape-recorded conversations and by interviews with other persons from whom McKibbin had extorted money. The court denied the motion in a written order on October 17, 1973 (App. E).

The competency of a witness to testify and the related issue whether to order a psychiatric examination to assist in determining competency are matters "peculiarly within the discretion of the trial court" United States v. Lee Wan Nam, 274 F. 2d 863, 865 (2nd Cir., 1960), certiorari denied, 363 U.S. 803 (1960). Ordering a witness to submit to a psychiatric examination is a "drastic measure" United States v. Russo, 442 F. 2d 498, 503 (2nd Cir., 1971). A psychiatric examination may seriously impinge on a witness' right to privacy and can serve as a tool for harassment. United States v. Benn, 476 F. 2d 1127, 1131 (D.C. Cir., 1973).

Appellant made no showing which could have justified subjecting Carapetyan to a pre-trial psychiatric examination. Gullibility and being the habitual butt of jokes do not disqualify a person from testifying as the complaining witness in a criminal prosecution. Particularly since the gist of

Carapetyan's story had been confirmed by electronic surveillance, the trial court did not abuse its discretion in refusing to order a psychiatric examination of the witness.

The court properly allowed the jury to evaluate Carapetyan's credibility and determine the weight to be given his testimony. On the witness stand, Carapetyan showed no signs of mental defect or disorder, and the jury obviously believed his version of the events. We observe further that the defense declined to take advantage of an offer by the trial court to permit a psychiatrist to testify as a defense witness concerning the medical significance of Carapetyan's courtroom demeanor and his behavior as reported in the affidavits, to the extent it bore on truth-telling (Tr. 156-157).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the Brief for Appellee have been mailed to Leon R. Port, Esquire, 123 Hicks Street, Brooklyn, New York, counsel for appellant McKibbin and Phylis Skloot Bamberger, Attorney, The Legal Aid Society, Federal Defender Services Unit, 606 United States Court House, Foley Square, New York, New York 10007, counsel for appellant DiGregorio.

DATED: 6/10/74, 1974

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